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SITI AISYAH v. PP

HIGH COURT MALAYA, SHAH ALAM
AZMI ARIFFIN J
[CRIMINAL APPLICATIONS NO: BA-44-319-11-2018
& 45B-37-06-2017]
B 17 DECEMBER 2018

CRIMINAL PROCEDURE: *Disclosure of information – Documents – Application for order to produce statements recorded under s. 112 of Criminal Procedure Code ('CPC') – Application under s. 51 of CPC – Whether prosecution under duty to*
C *disclose all relevant documents to defence – Whether 'document' in s. 51 of CPC included statement recorded under s. 112 – Whether object of s. 51 is for a limited access – Whether discretion of court confined to production of documents which are necessary or desirable for trial – Whether police statements absolutely privileged documents – Whether applicant would still have fair trial if application dismissed*

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This was an application by the applicant under s. 51(1) of the Criminal Procedure Code ('CPC') for an order for this court to direct the prosecution to provide copies of statements recorded under s. 112 of the CPC to the applicant. The statements were made by seven named witnesses offered by the prosecution to the defence at the close of the prosecution case. The
E applicant contended, *inter alia*, that (i) it was the Public Prosecutor's duty to disclose all relevant documents to the defence to ensure that the applicant get a fair trial; (ii) the statement recorded under s. 112 of the CPC could never be privileged as the law allows it to be admitted as evidence; and (iii) there was no danger of tampering with witnesses as the prosecution had completed
F its case and the statements requested were from the witnesses offered by the prosecution. The pertinent question herein was whether the word 'document' in s. 51 of the CPC included statement recorded under s. 112 of the CPC.

Held (dismissing application):

G **(1)** The object of s. 51 of the CPC is for a limited access and its scope is restricted in law. Section 51 allows the applicant to seek production of document in the possession of the prosecution, but only for a limited access. The discretion is confined to the production of documents or materials which are necessary or desirable for the purpose of the trial
H even though the literal reading of the language in the section seemed to allow a wide range of application. (paras 9 & 22)

(2) Police statements are absolutely privileged documents and remained privileged, not only at the pre-trial stage, but also when the trial proper has commenced. The obligation to preserve the police statements is a
I continuing one and will never end, even when the case had been

completely disposed of. The prosecution is under no duty to supply to the defence, a copy of the statement taken, even if the prosecution decides not to call the witness and make them available to the defence, unless the prosecution waived the privilege over the witness statement. Further, the 'immunity' shield could also be lifted or waived when the testimony of a witness who made the police statement had been challenged and the defence proposed to impeach his credit at the prosecution stage or the prosecution intended to impeach the credit of the defence witness at the defence stage. (paras 21 & 22)

(3) Even after the witnesses were offered to the defence, the police statement recorded under s. 112 of the CPC could never be categorised as 'unused material' because of it being absolutely privileged in nature. The discretionary powers given to the court to safeguard the disclosure or discovery of the police statements given by the witnesses was not only to ensure no tampering of the witnesses at any stage of the proceeding but also to ensure a fair trial and the avoidance of miscarriages of justice. (para 25)

(4) In the present case, even if the applicant's application for discovery was dismissed by the court, the applicant's right to have a fair trial had not been deprived or compromised. After having alerted and accepted the offer of the witnesses, the applicant would have the automatic right to interview the offered witnesses and to decide whether to call them as a defence witness or otherwise. The applicant may, after having conducted the interview, decide not to call any of the witnesses offered, but that would not detract the prosecution from its duty to produce them in court. (paras 28 & 31)

(5) Section 5 of the CPC was not applicable to the applicant as there was no *lacunae* in the CPC on this issue, making it unnecessary to resort to the English law and other foreign jurisdiction. (para 23)

Case(s) referred to:
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Husdi v. PP [1980] 1 LNS 29 FC ***(refd)***
Martin Rhienus v. Sher Singh [1949] 1 LNS 49 HC ***(refd)***
Muhammad Kadar & Anor v. PP [2011] 3 SLR 1205 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***
R v. Byrant & Dickson 1946 31 Cr App 146 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 5, 51(1), 51A, 112

For the prosecution - Muhamad Iskandar Ahmad; DPP
For the applicant - Gooi Soon Seng; M/s Gooi & Azura

Reported by S Barathi

JUDGMENT

Azmi Ariffin J:

Introduction

[1] In essence, this is an application made by the applicant under s. 51(1) of the Criminal Procedure Code *via* notice of motion dated 5 November 2018 (encl. 1) supported by affidavit affirmed by Kulaselvi Sandrasegaran dated 5 November 2018 for an order from this court to direct the prosecution to provide copies of statements recorded under s. 112 of the CPC to the applicant made by the seven named witnesses offered by the prosecution to the defence at the close of the prosecution case. The witnesses are:

(i) Ahmad Fuad Ramli;

(ii) Lim Cheng Gam;

(iii) Tomie Yoshio;

(iv) Ng Wai Hoong;

(v) Dessy Meyrisinta;

(vi) Raisa Rinda Salma; and

(vii) Kamaruddin Masiod.

[2] In respect of Muhammad Farid bin Jallaludin, a non offered witness where his statement was also recorded by the police, the applicant has decided not to pursue her request for his statement to be supplied to the applicant.

Law

[3] Section 51(1) of the CPC provides as follows:

> Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or documents is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summon or order.

What Amounts To Necessity Or Desirability?

[4] Section 51 authorises that documents or things which are necessary or desirable for the purpose of the trial or investigation may be ordered to be produced. So the document or thing called for must have some relation to or connection with the subject matter of the investigation or inquiry or throw some light on the proceeding or supply some link in the chain of evidence. The case on point is *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] 29 MLJ 34.

Applicant's Contentions

[5] The main issue here is whether the applicant has met the dual requirement of necessity and desirability laid down in s. 51 of the CPC? The learned counsel for the applicant contended that it is the public prosecutor's duty to disclose all relevant documents to the defence to ensure that the applicant gets a fair trial. Furthermore, according to the learned counsel, the statement recorded under s. 112 of the CPC can never be privileged as the law allows it to be admitted as evidence. The statements are not the property of the Government but instead it is the property of the public to ensure that justice is done.

[6] In addition to that the learned counsel also urged this court to adopt and apply the Commonwealth jurisdictions including Singapore and Brunei which have undergone a lot of development of law in imposing some form of non-statutory disclosure obligation on the prosecution. Counsel then submitted that it is against the notion of justice for the prosecution to withhold the statements in its possession that tend to undermine the prosecution's case or strengthen the defence's case. The case of *Muhammad Kadar & Anor v. PP* [2011] 3 SLR 1205 which is a decision of the Court of Appeal in Singapore was heavily relied on by the learned counsel which set out the law pertaining to the duty of the prosecution to disclose unused material to the defence.

[7] It was also contended that the danger of tampering with witnesses does not arise in the instant case as the prosecution has completed its case and the statements which the applicant requested for are from the witnesses offered by the prosecution. Furthermore, the prosecution admitted that they are still in the process of locating a few named witnesses as offered and therefore there can be no risk that the witnesses could be tampered with. In the upshot, the learned counsel urged this court to depart from the decision of Justice Syed Othman in *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 so as to keep abreast with the law as developed in all other Commonwealth jurisdictions.

A **Respondent's Response**

[8] In his opposing submission, the learned Deputy Public Prosecutor submitted that statements recorded under s. 112 of the CPC are privileged documents which cannot be supplied to the applicant because there is a real danger of tampering with witnesses as stated in *Husdi*'s case. Furthermore, B the applicant has been accorded a fair trial and the requirement of justice in this case has been met when the prosecution had given all the documents and materials requested by the defence before the trial and in the course of the trial. The learned Deputy also argued that there was no lacuna in our Criminal Procedure Code relating to the issue of disclosure by the C prosecution, hence s. 5 of our CPC is not applicable. It was also submitted that the authorities and principles on prosecutorial disclosure in other common law jurisdictions including Singapore and Brunei cannot be adopted as it is only of persuasive authority in nature. Learned Deputy contended that this court is bound by the decision of the Federal Court in *Husdi v. PP* (*supra*) D which referred and followed the case of *R v. Byrant & Dickson* (1946) 31 Cr App 146. According to the learned Deputy the principle of law on which the court reaches its decision in *Husdi*'s case must be followed as it is still a good law until today.

[9] Turning now to the present case, the pertinent question to be asked is E whether the word "document" in s. 51 of the CPC can also include statement recorded under s. 112 of the CPC. To me, it is a settled principle of law that s. 51 allows the applicant to seek production of document in the possession of the prosecution. The court has discretion to allow for discovery of document but only for a limited access. The discretion given is only confined F to the production of documents or materials which are necessary or desirable for the purpose of the trial even-though literally reading the language in that section seems to be capable of allowing for a wide range of application.

[10] Having said that, I now turn on the question of whether this court can direct the prosecution to supply the statements recorded under s. 112 of the G CPC as sought for by the applicant. In exercising such discretion the court would also need to consider the justice of the case and at what stage of the proceeding for discovery the application was made.

[11] In *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1 Justice Augustine Paul (as he then was) said:

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> A police statement recorded under section 112 of the CPC is absolutely privileged (see *Martin Rhienus v. Sher Singh* [1949] 2 MLJ 201, *Husdi v. PP* [1979] 2 MLJ 304. However the defence may have access to it for the purpose of impeaching the credit of a witness (see *Husdi v PP* [1980] 2 MLJ 80.

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[12] His Lordship then added:

> In any event, as a police statement is privileged, no adverse inference can be drawn from his non-production. This is based on the principle that the drawing of an adverse inference for the failure to produce a privileged document would be to destroy the privileged itself.

[13] In another case of *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312 the accused filed an application by way of an originating motion under s. 51 and/or s. 51A of the CPC for an order to compel the prosecution to produce the document, and materials which amongst others include a numbers of witnesses statements named and not named under s. 112 of the CPC. It should be pointed out that in the *Anwar*'s case the application was made before the commencement of the trial.

[14] The High Court allowed most parts of the accused's application except statements under s. 112 of the CPC of other witnesses not named by the accused. On appeal, the Court of Appeal overruled the finding of the trial judge.

[15] The Court of Appeal is of the view that the learned judge erred in law in not observing the judicial precedents with regards to the interpretation of s. 51 of the CPC in exercising his discretion. On further appeal, the Federal Court affirms the Court of Appeal findings. In coming to the said conclusion, reference was also made by the Federal Court to the case of *Rex v Byrant and Dickson* (*supra)*.

[16] Similarly in *Martin Rhienus v. Sher Singh* [1949] 1 LNS 49; [1949] MLJ 201 Willian CJ said:

> The question was raised by the court whether the provision of section 113 of the Criminal Procedure Code prevent a statement made under section 112 from being given in evidence at all, even in civil proceeding, but having decided that statements made under section 112 are absolutely privileged it is not necessary for me to decide this further question.

[17] Justice Syed Othman FJ (as he then was) sitting in a criminal revision in the High Court case of *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 summed up the legal position regarding police statement where he has this to say:

> The purpose of the police officer taking these statements is merely to collate evidence relating to circumstances surrounding the offence alleged in the first information, and also to determine whether or not there is sufficient or further evidence to prosecute the accused person. On completion of investigation the investigating officer is required by law to report to the public prosecutor. See section 120 Criminal Procedure Code. On the first information, police statement and other evidence, the Public Prosecutor decides whether or not to prosecute. By the very nature of the

A actions taken, police statements belong to a special class. Considering it under the Evidence Act, it does not come under section 78 which sets out the mode of the proof of every public document prescribed therein. Neither does it fall under section 79 which relates to presumption as to genuineness of certified copies, nor under section 80 which relates to presumption as to documents produced as evidence. And it must be noted
B that even if such statements to be used for impeachment, it must be proved, unless the witness to be impeached admits to having made such statement. See section 145 of the Evidence Act. A first information is admissible on production. See section 108A Criminal Procedure Code. Section 77 of the Evidence Act, as I see it, relates only to a public document where any person has the right to inspect.
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Considering the provisions in the Criminal Procedure Code and the Evidence Act, I can find no provision which is construable as giving a right to inspect a police statement.

[18] At p. 307 (MLJ), His Lordship further said in these words:

D But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with
E the witnesses. For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements.

[19] In *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80, Suffian LP (as he then was) held that where the defence seeks to impeach the credit of a
F prosecution witness, the defence can be supplied with a copy of the witness statement. The Federal Court agreed with the view expressed by Justice Syed Othman where in his judgment, Suffian LP said at pp. 81-82 (MLJ):

Encik Sri Ram cites section 5 of the Code, which provides that where there is lacuna in our law relating to criminal procedure, the court should apply English law, in so far as the same shall not conflict or be inconsistent
G with the Code and can be made auxiliary thereto. He then cites various English authorities showing that in the circumstances set out in questions as narrowed down, the proper cause is for statement to the defence, direct, without the intervention of the court. This is in contrast to the procedure under the old section 113(ii), under which there were two steps
H when the defence made a request:

step 1 - the court referred to the statement, and

step 2 - the court directed the counsel for the accused to be furnished with a copy of the statement, if the court thinks it expedient in the interest of justice.

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> We are of the opinion that when the defence wants to impeach the credit of a prosecution witness, it is entitled to a copy of his police statement; not, however, directly as in England, but, as under the old section 113(ii), i.e after the court has seen it and "thinks it expedient in the interest of justice" to order a copy to be supplied ...

[20] Further down in the same judgment, His Lordship continued:

> ... Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v. Public Prosecutor* out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

Findings

[21] For completeness, thus, it can be comprehended with ease that police statement is an absolutely privileged document. This privileged status will remain not only at the pre-trial stage but also when the trial proper has commenced or taken off in the sense that evidence has been led by calling of witnesses. The obligation to preserve the police statements is a continuing one and will never end even when the case has been completely disposed of.

[22] There can be no doubt that police statement belong to a special class of document. This must be so because even if the prosecution decides not to call the witness and make them available to the defence, they are under no duty to supply a copy of the statement taken to the defence unless the prosecution himself waived the privilege over the witness statements. The powerful use of the word absolute privilege speak for itself. Such "immunity" shield can also be lifted or waived when the testimony of a witness who make the police statement has been challenged and the defence propose to impeach his credit at the prosecution stage or the prosecution intend to impeach the credit of the defence witness at the defence stage. Only in the latter circumstances, the law allows the court to intervene and exercise its discretionary power for discovery and to determine whether it is relevant, necessary or desirable in the interest of justice for the prosecution to supply the statement to the defence. Therefore, there can be doubt that the object of s. 51 is for a limited access and its scope is restricted in law. To me, this is the fundamental safeguard built into the law to guarantee equality and fairness in a trial.

[23] Moving further, I am also of the view that s. 5 of the CPC is not applicable to the applicant as there was no lacunae in the Code on this issue making it unnecessary for me to resort to the English law and other foreign jurisdiction.

[24] On the contention by learned counsel that the issue of tampering of witnesses will no longer arise when the prosecution had completed its case and these witnesses were offered to the defence, with respect, I beg to differ. I am of the view that even at the defence stage tampering of witness/ witnesses can always happen in many forms such as using any type of physical force to keep a witness from testifying, or persuading a witness to change their testimony, and blackmailing or bribing a witness and attempts to keep a witness from testifying.

[25] Furthermore, even after these witnesses are offered to the defence, the police statement recorded under s. 112 of the CPC in Malaysia can never be categorised as "unused material" as repeatedly mentioned in the Singapore's case of *Muhammad Kadar v. PP* (*supra*) because of its absolute privilege nature. The discretionary powers given to the court to safeguard the disclosure or discovery of the police statements given by the witnesses is not only to ensure no tampering of witnesses at any stage of the proceeding but also to ensure a fair trial and the avoidance of miscarriage of justice.

[26] To the best of my knowledge, the above Malaysian decided cases that I have quoted, specifically on this contested issue, has never been reversed, overruled, superseded or considered no longer good law and typically cannot be relied upon. As an agent of justice, I would like to emphasise that I am bound by the judgment of our apex court and must apply the law as stated therein. In other words, the said quoted Federal Court decision must be observed, followed and accepted to avoid uncertainty in the law.

[27] It is trite that the doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decision of the courts of a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal (per Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1).

[28] In the present case, even if the applicant's application for discovery is dismissed by this court, the applicant's right to have a fair trial had not been deprived or compromised. This is because after having alerted and accepted the offer of the witnesses, the applicant will have the automatic right to interview the offered witnesses and to decide whether to call them as a defence witness or otherwise.

[29] If the prosecution failed to make them available to be interviewed and present in court then the prosecution will have to explain to this court why they have failed to do so. The learned Deputy Public Prosecutor informed this court and as admitted by them in their affidavit in reply, the prosecution is still in the midst of locating the witnesses offered by them.

[30] On this note, I would also like to say that I do not wish to speculate on this issue because at this point in time I do not know whether the prosecution is able to secure the attendance of all these witnesses and make them available to the defence. We will definitely cross that bridge when we come to it.

[31] To me, there is no slightest doubt in my mind that the prosecution knew that they have the bounden duty to secure the attendance of all the named witnesses except for the late Lim Cheng Gam who I was officially informed has recently passed away. The applicant may after having conducted the interview decided not to call any of the witnesses offered for whatever reason best known to her but that did not detract the prosecution from its duty to produce them in court.

[32] Having scrutinised the local and foreign authorities cited and after considering the submissions of learned counsel for the applicant and the learned Deputy Public Prosecutor for the respondent and for the reasons stated above, I find that the notice of motion in encl. 1 is without merit and must be dismiss.

[33] Finally, before I adjourn this proceeding, I wish to thank learned Deputy and learned counsel for their submission. Last but not least, my appreciation goes to all their backup team who have done a very comprehensive research on this interesting point of law.